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IN THE

Supreme Court of the United States

October Term, 1963

No. 617

ROBERT B. BLAIKIE,

Appellant,

AGAINST

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and JOHN R. CREWS, as Commissioners of Elections of the City of New York constituting the Board of Elections in the Elections in the City of New York and THE CITY OF NEW YORK,

Appellees.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS

HARRY H. LIPSIG,
Attorney for Appellant,
Robert B. Blaikie,
100 Church Street,
New York 7, New York.

LOEBB APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth 2-0689

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Appellees.

JURISDICTIONAL STATEMENT

Robert B. Blaikie, appellant herein appeals from the judgment of the New York State Court of Appeals dated August 22nd, 1963 dismissing his petition to declare unconstitutional Section 22 of the New York City Charter and respectfully submits that substantial questions are presented by this appeal which merit review and decision by this Monorable Court.

Opinion

The opinion of the New York State Court of Appeals is reported in 13 N. Y. (2) 134 and is annexed hereto as Appendix "A".

Jurisdiction

This action was instituted to set aside Section 22 of the New York City Charter as unconstitutional pursuant to the United States Constitution, Amendment 14 and the New York State Constitution. The judgment of the New York State Court of Appeals was entered on September 9th, 1963 and a notice of appeal was filed on September 13th, 1963. Jurisdiction of this Court to review the judgment by direct appeal is prescribed by Title 28 U. S. C. Section 1257 (2).

Questions Presented

This case raises two major questions. One concerns the right of a governmental body to place restrictions upon political organizations in the nomination of candidates for elected positions and the second involves the right of the said governmental body to restrict and limit the electorate in voting for all elective offices.

Simply stated, the questions are these:

1. Whether Section 22 of the New York City Charter is unconstitutional because it violates the due process and equal protection clauses of the 14th Amendment in the United States Constitution by disenfranchising the electorate and diluting, restricting and limiting their votes by denying to them the right to cast their ballots and have their votes counted for all elective offices.

2. Whether this section is unconstitutional because it violates the 14th Amendment by limiting the number of candidates that a political organization may nominate to a lesser number than existing vacancies and thereby denying political organizations and its members the right to nominate and elect candidates to fill all public offices.

Statutes Involved

The constitutional provision involved is the 14th Amendment to the United States Constitution. The Statute in question is Section 22 of the New York City Charter (Appendix "B").

Statement

Substantial Questions Are Presented

In March of 1961, Chapter 87, Laws of 1961 of the State of New York were signed into law and became effective immediately. This amended Section 20 of the City Home Rule Law provided that the Mayor of a City may appoint a Charter Revision Commission for the purpose of drafting a new charter for the City. Pursuant to this amendment, on April 2, 1961 Mayor Robert F. Wagner of the City of New York appointed an 11 man Charter Revision Commission.

This commission in its interim report of July 20, 1961 and its final report August 4, 1961 (Appendix C) recommended the adoption of a new City Charter containing a provision "limiting each voter" to one vote for Councilman-at-large even though there are two vacancies. It also restricted to one the number of candidates a political organization may nominate.

Thereafter, at the general election of November 7, 1961 the propositions pertaining to this charter were submitted to the public.

The Charter, as recommended by the Commission, was approved.

This City Charter for the City of New York contains Sec. 22, herein complained of. This Section provides for the election of two Councilmen-at-large in each of the boroughs in New York City but restricts political organizations from nominating "more than one candidate * * * in any borough" and limits the qualified voter "to vote for not more than one candidate * * * in each borough".

It is the intention of this Section to insure minority representation within the New York City Council. No exception is made to this commendable objective. However, most serious objection is made to the elective procedure prescribed in the Charter.

Section 22 in providing for only one candidate from each political organization and by restricting the elector to vote for less than the number of elective offices on the ballot, is unreasonable, discriminatory and violative of constitutional grant to nominate and vote for all candidates for public office.

A fundamental principle of American government is set forth in the clause which states that the "just powers"[1] of government are derived from the "consent of the governed".[2] Sec. 22 makes an outright gift of a purported elective office to a minority candidate. This is not government by the "consent of the governed."[3]

Our Courts have long recognized the right of the individual to participate in the selection of governmental officers. In *Rice* v. *Ellmore*, 165 F. 2d 387, the Court, at page 392 said:

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[1] Declaration of Independence.

[2] Ibid.

[3] Ibid.

> "An essential feature of our form of government is the right of the citizen to participate in the governmental process. The political philosophy of the Declaration of Independence is that governments derive their just powers from the consent of the governed; and the right to a voice in the selection of officers of government on the part of all citizens is important, not only as a means of insuring that government shall have the strength of popular support, but also as a means of securing to the individual citizen proper consideration of his rights by those in power. The disfranchised can never speak with the same force as those who are able to vote."

Elections can be really free only when people have a choice between alternatives and a way to express their choice. Such choice must be made through a truly free vote, with all offices open to all qualified candidates and without limitation upon qualified voters in the exercise of their franchise.

Voting is a necessary and essential civil liberty; it is the basic privilege of democratic government. Justice Douglas, recognizing this principle in *Day-Bright Lighting, Inc.* v. *Missouri*, 342 U. S. 421 (1951), stated: "The protection of the right of sufferage under our scheme of things is basic and fundamental" (p. 424). As the court said in 1886, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370, the right of franchise "is regarded as a fundamental political right, because preservative of all rights".

This Court has consistently stricken all electoral schemes that would limit and restrict the votes of the

electorate.[4] The right of the individual to vote was reenunciated in *Gray* v. *Sanders*, 372 U. S. 368 (1963). Justice Stewart concurring therein said: "* * * there can be room for but a single constitutional rule—one voter, one vote" (p. 382).

To be a citizen in a democracy means that one shares in all of the privileges and responsibilities of that form of government. One of the most important privileges is the right to vote. In *Smith* v. *Allright*, 321 U. S. 649 (1944), at pages 661-662, the Court said: "* * * The right to vote in a general election, is a right secured by the constitution."

Justice Douglas in *Gray* v. *Sanders*, *supra*, for the majority, said that an individual "whose right to vote is impaired has the right to sue for redress."[5] He further stated:

> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the 15th, 17th and 19th Amendments can mean only one thing—one person, one vote" (p. 381).

Throughout the history of the United States, it has continuously extended democracy by making it possible

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[4] *U. S.* v. *Classic*, 313 U. S. 299 (1941); *Baker* v. *Carr*, 369 U. S. 186 (1962); *Nixon* v. *Condon*, 286 U. S. 73 (1931); *Guinn* v. *United States*, 238 U. S. 347 (1915); *Nixon* v. *Heindon*, 273 U. S. 536 (1927).

[5] The opinion in a footnote at page 375 cited Chief Justice Holt in *Ashley* v. *White*, 2 L. D. R. AYM 938: "a right that a man has to give his vote at the election of a person to represent him in parliament * * * is a most transient thing, and of a high nature * * * (I)t is a great injury to deprive (him) of it." This opinion rendered 250 years ago highlights the ever real concern over any restriction placed upon the qualified voter.

for more and more people to vote. First, there was the gradual elimination of property qualifications. Then freed slaves were made citizens and given the right to vote and finally women were given the vote by constitutional amendment.

Today there is a growing movement toward the widening of the franchise, for example, to permit 18 year olds to vote. Section 22 of the New York City Charter in reversing this trend, places unwarranted restrictions and limitations on the right of a qualified elector to vote.

A great tragedy in American politics is the fact that a large number of qualified citizens do not take the trouble to vote. A strong and effective democratic government depends upon the full participation by the electorate.[6] Civic groups, politicians and even a Presidential Commission[7] exhort the electorate to register and vote. Today, in New York City, the qualified voter is denied his right of franchise and cannot "share in the government to the utmost".[8]

In *Colegrove* v. *Green*, 328 U. S. 549 (1946) the Court declined jurisdiction to determine the constitutionality of the Illinois Apportionment Law.[9] In the minority opinion by Justice Black joined in by Justices Douglas and Murphy, it was stated:

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[6] Aristotle in "Politics" Book IV said: "If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost"

[7] President's Commission of Registration and Voting Participation.

[8] Aristotle: "Politics", Book IV

[9] *Baker* v. *Carr*, 369 U. S. 186 (1962) of course upheld the right of an individual to sue to compel reapportionment and in effect overruled the majority opinion in *Colegrove* v. *Green*, *supra*.

> "* * * the constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that State election systems, no matter what their form, should be designed to give approximately equal weight of each vote case. * * * legislation which must inevitably bring about glaringly unequal representation in the Congress in favor of special classes and groups should be invalidated, 'whether accomplished ingenuously or ingenuously'" (570-571).[10]

New York City, second only to the Federal Government, has the largest budget in the country. It is the City Council that enacts the tax legislation for the City of New York.

The election of the ten Councilmen-at-large to the City Council "by limited voting" denies complete and fair representation to the voter and taxpayers of the City of New York.[11] The electorate is denied equality under the

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[10] In view of the decision in *Baker* v. *Carr*, cited *supra* in the holding that apportionment statutes and/or misapportionments may now be questioned in the Federal Courts the minority opinion herein cited has been in effect adopted by this Court.

[11] At the general election of Nov. 5 1963, there were 1,656,860 votes cast in New York City in the race for Councilmen-at-large. The votes by borough is as follows: Manhattan 318,221, Bronx 314,339, Brooklyn 595,835, Queens 461,346, Richmond 57,119.

In all of the Boroughs with the exception of Richmond, the top candidate in the race received more than 50% of the total votes cast in the election. The second highest, who of course, was elected by the system, prescribed by Sec. 22 of the City Charter, in two of the boroughs, received less than 50% of the vote cast for the one receiving the highest number of votes. The votes cast in the various boroughs for the two individuals elected to the position of Councilmen at large is as follows: Manhattan 100,589 and 169,386; Bronx 79,269 and 181,575; Brooklyn 127,790 and 267,321; Queens 164,762 and 258,689 and Richmond 22,136 and 24,714.

It is obvious from the figures herein that 1,656,860 votes were denied the franchise; denied the right to vote for all officers to be elected.

law in representation within the City Council by being denied their right to vote for all officers.

Sec. 22 of the New York City Charter denies the right of a political party to nominate a candidate for all elective offices in a general election There have been political parties in the United States since the founding of the Republic. It has been these free independent political organizations which have contributed and maintained the democracy that exists in the U. S. today. It is fundamental that those countries that have restrained, restricted and suppressed the political parties have become a dictatorship.

All attempts by a legislature to restrict a political party in nominating a qualified candidate for all elective positions should and must be condemned by the Courts (Cf. *Ray* v. *Blair*, 343 U. S. 214 [1951]).

Conclusion

Consistent with the Federal Constitution a State may enact reasonable qualifications for voters. Once these qualifications, however, have been established the State may not thereafter discriminate amongst those whom it has qualified, by restricting their right to exercise their franchise completely in voting for all elective offices.

The State of New York established qualifications for its electorate and then New York City acting under State authority restricted, limited and diluted the votes of the electorate.

An unreasonable discriminatory restriction was placed upon the voter by limiting his vote to only one of two offices to be elective by the people. Further restriction was placed upon political organizations denying them the

right to nominate a qualified candidate for all elective offices.

Appellant submits that these restrictions placed upon the qualified voter and political organizations is in violation of the 14th Amendment in the United States Constitution by denying to the electorate the equal protection and due process of law.

Appellant believes that the questions presented by this appeal are substantial and of importance, not only to the voters of the City of New York, but to all voters throughout the country. This scheme of restriction on both the electorate and political organization could be and may be adopted by other governmental authorities to sustain and perpetrate racial discrimination and/or misapportionment.

For all of the foregoing, it is respectfully submitted that jurisdiction of this appeal should be noted and a hearing on the merits should be granted.

Respectfully submitted

HARRY H. LIPSIG,
Attorney for Robert B. Blaikie, Appellant.

HARRY H. LIPSIG and
MURRAY L. LEWIS, Esqs.,
Of Counsel.

APPENDIX A

OPINION COURT OF APPEALS

In the Matter of ROBERT B. BLAIKIE, individually and On Behalf of Others Similarly Situated,

Appellant,

v.

JAMES M. POWER, et al., Constituting the Board of Elections of the City of New York, et al.,

Respondents.

Decided August 22, 1963

FULD, J. In this case, involving the constitutionality of the recently adopted New York City Charter provision relating to the election of councilmen at large, *Johnson* v. *City of New York* (274 N. Y. 411)—which dealt with an earlier provision of a somewhat similar charter—is dispositive of the issue presented.

At the general election held in November of 1961, the following two questions were submitted to the voters of the City of New York:

> "Shall the proposed new city charter recommended by the City Charter Revision Commission be adopted?"
>
> "Shall the system of limited voting for the election of Councilmen-at-large, provided for in the Charter proposed by the Charter Revision Commission of the City of New York, be adopted?"

Both questions were answered in the affirmative by a majority of the votes cast, and the Charter as thus approved contained the provision here under review—presently numbered Section 22—which provides, in sum, that the City Council shall consist of a member to be elected from each senate district in the city and 10 additional councilmen at large to be elected borough-wide, two from each of the five boroughs. In prescribing the method of election of such councilmen at large, the Charter limits each voter to vote for a single borough-wide candidate, also providing that a party (or independent body) may nominate only one candidate for councilmen at large in each borough. There may, of course, be three or four or more candidates on the ballot for that office. This system of voting, known popularly as "limited voting", was recommended after lengthy and thoughtful study by two successive commissions in order to make possible the election of minority representatives.[1]

The principal challenge to the constitutionality of section 22 is that, by providing that a voter may vote for only one of the two candidates for the offices of councilmen at large from his borough, it deprives him of a right to vote for a candidate of his choice for both of the elective offices to be filled and thereby offends against section 1 of article II of our State Constitution. Entitled "Qualifications of Voters", that section reads in part in this way:

> "Every citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state for one year next

[1] These two commissions were in the New York State Commission on Governmental Operations of the City of New York headed by Honorable Frank C. Moore as chairman (see Draft of Proposed Charter for the City of New York, dated Feb. 20, 1961) and the Charter Revision Commission of the City of New York under the chairmanship of Honorable John T. Cahill (see Proposed Charter for the City of New York filed Aug. 4, 1961).

> preceding an election, and for the last four months a resident of the county, city or village and for the last thirty days a resident of the election district in which he or she may offer his or her vote, shall be entitled to vote at such election in the election district of which he or she shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be submitted to the vote of the people."

As indicated above, this Court's decision and reasoning in the *Johnson* case (274 N. Y. 411, *supra*), in which proportional representation, a different form of limited voting, was upheld as constitutional, are decisive of the present appeal. Confronted with the very arguments now advanced to support the petitioner's contention that section 22 is unconstitutional, the court rejected them, concluding that proportional representation was not proscribed by any constitutional provision.

In *Johnson*, as here, it was urged that article II, section 1, of the Constitution was to be taken literally and that as so read, it commanded that each voter was to have the unrestricted right to vote for each office to be filled. Although his view gained the adherence of Judge Rippey (274 N. Y. at pp. 439-440), the majority decided otherwise, expressly holding that the purpose of the constitutional provision was solely to remove the disqualifications which attached to the person of the voter in earlier times and thereby assure to a citizen, qualified by age and residence, the same right to vote as every other similarly qualified voter possessed. In other words, section 1 of article II was designed not to regulate the mode of selection of elective officers but rather to regulate the status of voters and to protect otherwise qualified voters from

electoral discrimination. As the court put it (274 N. Y., at pp. 418-419):

> "No one can read the history of these changes in the early Constitution without realizing that the object of the change in the law made by these two Constitutions was to remove the disqualifications which attached to the person of the voter. Poverty was no longer to disqualify any male citizen over twenty-one years of age who had resided a sufficient length of time within the State and territory where he voted. The special class of electorate was abolished and all were treated on an equality.
>
> * * * 'The obvious purpose of the article [art. II, §1] was to prescribe the general qualifications that voters throughout the State were required to possess to authorize them to vote for public officers or upon public questions relating to general governmental affairs.' [*Spitzer* v. *Village of Fulton*, 172 N. Y. 285, 289]" (See, also, 11 N. Y. S. Const. Convention Committee [1938], pp. 139-171).

Moreover, in distinguishing *Matter of Hopper* v. *Britt* (203 N. Y. 144), the court observed that, whereas the provisions there considered related to a "limitation placed upon one voter which did not apply to another voter in the same district", the proportional voting provision then before it "treats all electors alike", and, accordingly, did not violate the Constitution (274 N. Y., at p. 423). And, in concurring with the majority, Judge Lehman, after noting that section 1 of article II "was drafted" to remove the disqualifications which attached to the person of a voter and not to assure an elector the right to vote for each and every office to be filled, concluded by stating that the proportional representation system "does not violate the spirit of any of the great basic principles which are in-

tended to be protected by the Constitution" (274 N. Y. at p. 433). "Though I share Judge Rippey's misgivings about the possible result of the innovation", he said, "such misgivings may not blind me to the fact that the innovation does not violate the spirit of any of the great basic principles which are intended to be protected by the Constitution and that it is possible to construe the letter of the Constitution in manner which will confine its letter to the purposes which it is clear that the letter was intended to cover."

As is apparent from the foregoing, the question before us is a very narrow one: Does the system of limited voting prescribed in section 22 so materially differ from the system of proportional voting upheld in the *Johnson* case as to bring it in conflict with article II, section 1?

The Justice at Special Term, thought it did; he believed that there was a difference of substance between the limited voting provisions of section 22 and those provisions relating to proportional representation in that, to cull from his opinion, under the former "each elector can vote to fill only one of two vacancies * * * [being] thereby precluded from voting for every office to be filled", while under proportional representation "every voter was afforded the opportunity to make a selection of a nominee for every vacancy to be filled within the political subdivision". The purported distinction does not exist. A reading of old chapter 43 of the Charter—which provided the method of election of councilmen by proportional representation—demonstrates that under both the sanctioned proportional representation method and the limited voting system of section 23 the elector had a single "vote" regardless of the number of offices to be filled. As provided in former chapter 43, the voter expressed his preferences or choices on his ballot by placing

the number "1" in the square opposite the name of the candidate of his first choice, number "2" opposite his second choice and so on down the list (§1005). The instructions to voters contained in the statute recited, "You may mark as many choices as you please" (§1005) but, in providing for the counting of the ballots, the applicable section of the Charter made it plain that the several alternative choices were not votes. Thus, section 1007 explicitly limited each voter to a "single" vote, a "single transferable vote" (See *Johnson* v. *City of New York*, 274 N. Y. 411, 427-429), and indeed, in his opinion for the court, the Chief Judge remarked that (p. 424):

> "The main argument against the constitutionality of this chapter has been that the proportional voting system permits the voter to select but one of the Councilmen [out of the many to be elected] from his borough."

Judge Lehman likewise made it clear that it was "a system by which the votes of each voter may be counted for only one candidate though more than one officer is to be chosen at the election" (274 N. Y., at p. 433). In point of fact, it was precisely because the vote was so limited that Judge Rippey concluded, as the lone dissenter, that chapter 43's proportional representation system was unconstitutional (274 N. Y., at pp. 438-440).[2]

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[2] This is what Judge Rippey wrote (274 N. Y., at pp. 438-440: "No matter how many offices of Councilmen have thus been created, no elector is permitted to have his vote counted for more than one candidate and that one candidate is the one on whom the counting personnel determines his choice shall fall. * * * The practical result of its operation is * * * the disenfranchisement of duly qualified voters by exclusion of their right to vote and to have these votes counted for candidates of their choice for all offices to be filled or voted on in these several units of representation. * * * There is no provision of law in this State and cannot be any such which bars a duly qualified

The majority opinion in *Johnson* reminds us that limited voting systems almost identical in substance with the system now under review were in effect in New York City for many years during the 19th century in connection with the election of supervisors and aldermen, the predecessors of councilmen. As the court noted, "limited or proportional voting was carried on in the City of New York * * * for a continuous period of thirty years from 1857 to 1887" (274 N. Y., at p. 422) and, the Court added (p. 423), despite the fact that during those years "the press and the bar included men of marked ability and energy, with a willingness and courage to attack any fundamental principle of municipal government which was wrong" it was never declared unconstitutional.[3]

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voter from casting his ballot for his candidate for every office for which voting is permissible within his election district. And yet this law says that he can vote for one Councilman and for one only although there may be, under the terms of the act, if he resides in Brooklyn, at least as many as twelve Councilmen to be elected, or if he resides in Manhattan at least as many as nine and all such offices available for his vote within the election district within which he resides. Under chapter 43, no matter how many offices of Councilmen may be created by the voters in any particular unit of representation, the ballot of the elector can be counted for only one candidate for one office. No matter how many choices he may indicate on his ballot, his vote will count, if it counts at all, for only one choice." (Emphasis supplied.)

[3] Although it may not be of operative significance, it is of some interest that an attempt was made in the Constitutional Convention of 1938 to override the court's decision in *Johnson* and to have the Constitution amended to reflect Judge Rippey's dissenting view (see 4 Revised Record of Const. Convention of State of N. Y., pp. 3225-3240). The proposal was submitted to the voters and rejected by them (see McKinney's Cons. Laws of N. Y., Book 2, Part I, Constitution, p. 178). Aimed at prohibiting "any system of proportional representation" the proposed amendment would have provided, in a new section 9, that "Every voter shall be entitled to vote at each and every election in this State or any of its subdivisions for as many persons as there may be offices to be filled thereat".

In the context of the constitutional provision (art. II, §1), limited voting and proportional representation are in substance and effect identical. Limited voting is much less complex and will probably have different consequences but each system necessarily involves a limitation of voting, imposed on all voters alike, in order to make possible of achievement some minority representation in a multiple body. Consequently, based on our decision in the *Johnson* case, it is clear that section 22 of the Charter does not offend against our Constitution.[4]

Nor is there any basis for the petitioner's further contention that it violates the Fourteenth Amendment of the Federal Constitution. In our view, nothing said in *Gray* v. *Sanders* (372 U. S. 368), and certainly nothing there decided, has any bearing on the case before us.

The repeated efforts of New York City extending over the last century, to provide some form of minority representation in the machinery of local government is evidence of the widespread feeling that such representation can play an important role in a democracy. Indeed, in the *Johnson* case, the court characterized it as "an attempt to make representative government a reality" (274 N. Y., at p. 430). Be that as it may, New York's latest experiment in limited voting, approved by its inhabitants, is one which the Constitution permits it to make.

The order appealed from should be affirmed, without costs.

Burke, J. (concurring) I concur with Judge Fuld but would add, as the Corporation Counsel so well stated, that "even if it were assumed that Article II, Section 1,

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[4] In the view here expressed, it is unnecessary to consider whether the Home Rule Amendment (N. Y. Const., art. IX, §§9, 12 qualifies article II, section 1, with respect to local office.

does bar a system of limited voting, the system prescribed in the New York City Charter would not be affected because the constitutional provision is limited in its application to elections involving state officers or state issues." (*Spitzer* v. *Village of Fulton*, 172 N. Y. 285, 289, cited with approval in *Johnson* v. *City of New York*, 274 N. Y. 411, 419).

Section 1 of article II must be read together with sections 9 and 12 of article IX. When so read it is manifest that "to hold that the 'mode of selection' must conform to any 'mode of selection' elsewhere prescribed in the Constitution would utterly defeat the [purpose of the] Home Rule Amendment." (*Bareham* v. *City of Rochester*, 246 N. Y. 140, 145, 146, 149). "If * * * Section 1 of Article II of the Constitution bars limited voting, the mode of selection adopted by [the people of the City of New York under the] Home Rule Amendment must prevail."

Chief Judge Desmond (dissenting). The question on this appeal is as to the validity of an amendment to section 22 of the New York City Charter which amendment provides for ten additional members of the City Counsel, two to be elected at large from each of the five boroughs of the city. The nominating and voting formula found in the new enactment is most unusual in that, although there are two councilmen to be elected at large from each borough, no citizen may vote for more than one candidate and no political party may nominate more than one candidate. The necessary and intended result is that in each borough one of the newly created councilmanic offices is to be filled by a candidate who has gotten a majority vote but the other new councilman in the same borough will gain office by a minority vote only.

Section 1 of article II of the New York Constitution as it is now and has been since 1826 states the flat prop-

osition that every citizen with the specified age and residence qualifications "shall be entitled to vote * * * in the election district of which he or she shall at the time be a resident * * * for all officers that now are or hereafter may be elective by the people". The guarantee of the right to vote for "all officers * * * elective by the people" is so plainly and positively articulated (whatever its original purpose, see *Johnson* v. *City of New York*, 274 N. Y. 411, 432) as not to need or allow construction or interpretation (*Settle* v. *Van Ferra*, 49 N. Y. 280). No refined reasoning can make it mean the opposite of what it says.

The Charter amendment we are examining was adopted in 1961 by referendum vote so as to add ten more (two from each borough) to the existing number of members of the City Council. A voter is, however, not to be permitted to cast his vote for the two candidates he prefers for the two newly added offices in his borough. The new Charter provision allows him to vote for one only of the candidates, although there are two such new offices in each borough. A further provision of the Charter amendment directs that of the candidates nominated by any one political party (or independent body) for these new borough-wide councilmanic offices, no more than one shall be elected. In other words: no voter can vote for more than one and no political group can elect more than one. Result: of the ten new councilmen no more than five can be the nominees of any one party. Another result would be that of several minority parties represented on the ballots in a borough, one only such minority group could elect a councilman and other minorities, although producing nearly as many votes, could have none.

Appropriate legislative representation for minorities is a desirable objective but in a government of laws a worthy end cannot validate unconstitutional means or

change the Constitution's meaning "because the enlarged construction would be desirable or convenient" (*People ex rel. Williams* v. *Dayton*, 55 N. Y. 367, 379). Since the Charter amendment prevents a citizen from voting for all the offices being contested for in his voting district, it violates section 1 of article II of the State Constitution and is a complete nullity, totally unenforcible.

We find no decision which would be a precedent for so construing the Constitution as to validate this statutory amendment. The closest case is, of course, *Johnson* v. *City of New York* (274 N. Y. 411, *supra*), holding valid the proportional representation system of choosing city legislators. It was found possible to hold the plan not to be violative of the constitutional mandate that every citizen must be allowed to vote for every elective officer. In a sense, under proportional representation the voter did or could express a choice for all the council memberships to be filled since he could state on his ballot his first, second, third choice, etc. Anyhow, the proportional representation system is entirely different from the one proposed here and the *Johnson* case cannot be read as setting up some new broad nonequality principle in opposition to the Constitution itself.

The Appellate Division, in holding the amendment to be valid under the State Constitution, did not deal directly with section 1 of article II (*supra*) apparently being of the opinion that this section has no impact on "limited voting" in local elections. The Appellate Division took the position (seemingly rejected in *Johnson* at page 431 of 274 N. Y.) that under section 12 of article IX of the Constitution (home rule) the city, being expressly given power to enact local laws in respect to the "mode of selection" of its officers, can ignore the guarantee of section 1 of article II that each voter must be

allowed to vote for all elective officers. In this connection the court cited *Bareham* v. *City of Rochester* (246 N. Y. 140, 146) and *Spitzer* v. *Village of Fulton* (172 N. Y. 285, 289), but we find nothing in those decisions authorizing a system of local elections in direct opposition to the fundamental command (see *Matter of Hopper* v. *Britt*, 203 N. Y. 144, 151) of section 1 of article II. "Mode of selection" cannot be stretched so far.

The Appellate Division did add a statement that the *Johnson* "Proportional representation" case (274 N. Y. 411, *supra*), justified the amendment we are considering. As explained above, we do not agree.

Beyond all this there is a real question as to whether this Charter amendment conflicts with the Fourteenth Amendment to the United States Constitution and the concept of political equality of voters so strongly asserted in *Gray* v. *Sanders* (372 U. S. 368, 380, 381, 382), with its insistence on "one voter, one vote".

We agree with Special Term. The order of the Appellate Division should be reversed and the Special Term order reinstated, without costs.

Judges Van Voorhis, Scileppi and Gibson* concur with Judge Fuld: Judge Burke concurs in a separate memorandum; Chief Judge Desmond dissents and votes to reverse and to reinstate the order of Special Term in an opinion in which Judge Dye concurs.

Order affirmed.

.....

* Designated pursuant to section 2 of article VI of the State Constitution in the temporary absence of Judge Foster.

APPENDIX B

Section 22 of the New York City Charter reads as follows:

"Composition of council.—a. The Council shall consist of the president of the council and of other members termed councilmen.

b. One councilman shall be elected from each senate district as now or hereafter constituted lying wholly or partly within the city, and two councilmen shall be elected at large from each of the boroughs.

c. No party or independent body as defined in the election law shall nominate more than one candidate for councilman to be elected at large in any borough.

d. Each elector shall have the right to vote for not more than one candidate at large and the two candidates receiving the largest number of votes in each borough shall be elected.

e. The first election of councilmen at large shall be held at the general election in the year nineteen hundred sixty-three and the terms of councilmen so elected shall expire coterminously with those of the councilmen then in office."

APPENDIX C

Report Charter Revision Commission of July 20, 1961:

"II. The Council—To be the sole legislative body of the city to consist of a president elected city-wide and a member elected from each senate district, as at present, with the addition of 10 councilmen to be elected borough-wide, two in each borough. The election of such borough-wide councilmen may be by a system limiting each voter to vote for a single borough-wide candidate, thus making possible the election of minority representatives. The proposal for limited voting will be submitted to the voters as a separate proposition."

Report of Commission of August 4, 1961 which states in part:

"The proposal for minority representation through limited voting will be submitted as a separate proposition, as originally announced, but it will contain a further provision that a party or independent body may nominate only one candidate for Councilman-at-Large in each borough".

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IN THE

Supreme Court of the United States

October Term, 1963

No. 617

In the Matter of the Application of

ROBERT B. BLAIKIE

individually and on behalf of others similarly situated as duly qualified elector and voter,

Appellant,

against

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and JOHN R. CREWS, as Commissioners of Elections of the City of New York constituting the Board of Elections in the City of New York and THE CITY OF NEW YORK,

Appellees,

for an order restraining the conduct of a general election in the year 1963, for the office of Councilman-at-large in the City of New York and declaring unconstitutional, invalid, null and void Section 22 of the New York City Charter entitled "Composition of Council."

MOTION TO DISMISS OR AFFIRM

LEO A. LARKIN
Corporation Counsel
City of New York
Attorney for Appellees
Office and Post Office Address
Municipal Building
Borough of Manhattan
New York 7, New York

SEYMOUR B. QUEL,
JOEL L. COHEN,
of Counsel.

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for an order restraining the conduct of a general election in the year 1963, for the office of Councilman-at-large in the City of New York and declaring unconstitutional, invalid, null and void Section 22 of the New York City Charter entitled "Composition of Council."

MOTION TO DISMISS OR AFFIRM

The appellees, The Board of Elections of the City of New York and the City of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss this appeal on the ground that no substantial federal question is presented to warrant further argument or, in the alternative, that the judgment entered upon the remittitur of the Court of Appeals of the State of New York be affirmed.

Charter Provision Involved

The challenged Charter provision, Section 22 of the New York City Charter, is set forth in Appendix B of the appellant's jurisdictional statement. The statute in question, adopted by the voters of the City of New York on November 7, 1961, was designed, among other things, to permit minority representation with respect to the office of councilman at large through a system of limited voting.

Question Presented

The sole issue for determination is whether those provisions of Section 22 providing for the election of two Councilmen at large from each of the City's five boroughs, limiting each party or independent body to the nomination of not more than one candidate for such office, and providing that each elector shall have the right to vote for not more than one candidate for such office violate the Fourteenth Amendment of the United States Constitution.

Statement of the Case

Appellant instituted this proceeding for (1) a declaration that Section 22 of the New York City Charter violates both the Constitutions of the United States and of the State of New York and, (2) an order enjoining the defendants from conducting a general election for the office of Councilman at large in the City of New York in the year 1963. The proposed appeal seeks a review of the judgment, entered upon the remittitur of the New York Court of Appeals affirming the order of the Appellate Division, First Judicial Department of the New York Supreme Court, which dismissed the proceeding.

History of Charter Section 22

The New York City Charter was adopted by the New York City voters pursuant to the provisions of Chapter 87 of the Laws of 1961. Under the express provisions of that chapter, the following two questions were submitted to the voters:

1. "Shall the proposed new city charter recommended by the City Charter Revision Commission be adopted?"

2. "Shall the system of limited voting for the election of Councilman at large, provided for in the charter proposed by the Charter Revision Commission of the City of New York, be adopted?"

Both questions received a majority of affirmative votes at the polls.

The Charter approved under Question 1 contained a Section 22 which provided as follows (Proposed Charter for the City of New York, filed with the City Clerk, August 4, 1961, p. 3):

"Composition of Council

§22. a. The council shall consist of the president of the council and of other members termed councilmen.

b. One councilman shall be elected from each senate district as now or hereafter constituted lying wholly or partly within the city and *two councilmen shall be elected at large from each of the boroughs.*

c. The first election of councilmen at large shall be held at the general election in the year nineteen hundred sixty-three and the terms of the councilmen so elected shall expire coterminously with those of the councilmen then in office." (Emphasis supplied.)

The system of limited voting, approved under Question 2, by its terms superseded Section 22 approved under Question 1 (cf. Appendix A). Both Section 22, adopted pursuant to Question 1, and alternative Section 22, adopted pursuant to Question 2, contained identical provisions for (a) the election of one Councilman from each senate district, (b) the election of two Councilmen at large from each of the five boroughs, and (c) the time for the first election of Councilmen at large as well as the expiration of their first term of office.

In addition, alternative Section 22 contained those provisions challenged herein which provided for minority representation through a system of limited voting.

The Petition

The petition asserted that those provisions of Section 22, adopted by the voters under Question 2, which were intended to insure minority representation in the New York City Council violated both the Constitutions of the United States and of the State of New York. It did not, however, specify the particular provision of the Constitution of the United States claimed to have been violated.

The petition contained a merely conclusory allegation that a system which limited the right of all political parties or independent bodies to nominate and limited the right to vote of all electors was unconstitutional.

The Decisions Below

Upon the hearing of the proceeding, the Justice sitting at Special Term of the New York Supreme Court, New York County, held that Section 22 violated the Constitution of the State of New York. The opinion did not reach or pass upon the alleged federal question mentioned in the petition.

Upon the appeal to the Appellate Division, First Judicial Department of the New York Supreme Court, appellant stated in his brief that Section 22 of the New York City Charter in restricting "both the political party and the elector to nominate and vote for one candidate violated the 14th Amendment of the United States Constitution." The Appellate Division unanimously reversed the Court below and dismissed the proceeding, thus rejecting appellant's contention that the Charter provision contravened the 14th Amendment of the United States Constitution.

The conclusion reached by the Appellate Division was sustained by a majority of the Court of Appeals. Judge FULD, writing the prevailing opinion stated (13 N Y 2d 143):

> "Nor is there any basis for the petitioner's further contention that it violates the Fourteenth Amendment of the Federal Constitution. In our view, nothing said in *Gray* v. *Sanders* (372 U. S. 368), and certainly nothing there decided has any bearing on the case before us."

Chief Judge Desmond, dissenting, stated (13 N Y 2d 146):

> "Beyond all of this [whether the provision violated the New York Constitution] there is a real question as to whether this Charter amendment conflicts with the Fourteenth Amendment to the United States Constitution and the concept of political equality of voters so strongly asserted in *Gray* v. *Sanders* (372 U. S. 368, 380, 381, 382) with its insistence on 'one voter, one vote.'"

On October 25, 1963, Judge FULD denied appellant's application for an order restraining the conduct of the gen-

eral election on November 5, 1963, for the office of Councilman at large. Finally, on November 1, 1963, Mr. Justice Harlan of this Court denied a similar application.

The opinions of the Court of Appeals are reported in 13 N Y 2d 134 (1963), —— N. E. 2d ——.

ARGUMENT

No substantial federal question is presented by the appeal.

The provisions of Section 22, challenged herein, were fashioned to insure effective minority representation and correct the inherent defect of district representation which allows a stronger party to prevail to an extent out of proportion to its actual size. Moreover, the voters of the City of New York, recognizing the possibility of one party winning in all districts, through even distribution of a moderate majority, saw the need to strengthen the party system through the means of limited voting.

Appellant concedes this was the intent of the Section and, yet, argues that the elective procedure violates the Fourteenth Amendment. The infirmities inherent in his argument become readily apparent upon a review of those cases decided by this Court concerning claims of voting discrimination.

The equal protection clause of the Fourteenth Amendment was fashioned so that "cities, states and the Federal Government must exercise their power so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation." *Railway Express* v. *New York*, 336 U. S. 106, 112 (1949). As this Court stated in *Gray* v. *Sanders*, 372 U. S. 368, 379-380 (1963):

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote * * *. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."

Section 22 allows all electors and political bodies an equal vote and an equal right to nominate within the designated geographical unit, the borough. The restrictions are applicable to all and create no preferred class of voters or preferred political body.

The Section does not attempt arbitrarily to impair the right to vote by dilution stemming from a false tally, *United States* v. *Classic*, 313 U. S. 299 (1941); or by refusal to count votes from arbitrarily selected precincts, *United States* v. *Mosley*, 238 U. S. 383 (1915); or by the intimidation of voters, *Ex parte Yarbrough*, 110 U. S. 651 (1884); or by ballot-box fraud, *Ex parte Siebold*, 100 U. S. 371 (1880); *United States* v. *Saylor*, 322 U. S. 385 (1944).

The Section also has no similarity to decisions announcing the right of Negroes to participate equally with all other races in the electoral process—starting with *Nixon* v. *Herndon*, 273 U. S. 536 (1927), progressing through the "white primary" cases, *Smith* v. *Allwright*, 321 U. S. 649 (1944) and *Terry* v. *Adams*, 345 U. S. 461 (1953), and culminating in the attempted "gerrymandering" in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

The reasonableness and effectiveness of the system of limited voting prescribed by Section 22 is readily discernible

from an analysis of the New York City Council as it existed prior to and after the first election held pursuant to the Charter provision. Prior to the General Election held in New York City on November 5, 1963, the composition of the Council, elected on a district basis, was 23 Democrats and 2 Republicans, or, in percentage terms, 92% and 8%. Yet, approximately 26% of the voters of the City were registered Republicans.

However, after January 1, 1964, the composition of the Council will be 28 Democrats and 7 Republicans or 80% and 20%. The system of limited voting is fairer to all and to all votes counted.

Under Section 22 the people voluntarily grant a political minority a voice more proportionate to its actual size in their legislative body. As such, the underlying philosophy is exactly opposite to that presented to this Court in *Baker* v. *Carr*, 369 U. S. 186 (1962), and other malapportionment cases, in which minorities attempt to perpetuate themselves as a majority. Directly apposite is *Hile* v. *City of Cleveland*, 266 U. S. 582 (1924) in which this Court dismissed for want of a substantial federal question an appeal from a decision of the Ohio Supreme Court sustaining the validity of a system of proportional representation for election of members of the local council whereby a vote was counted for only one candidate although several vacancies for that office were to be filled.

Appellant's further contention that Section 22 violates the due process clause of the Fourteenth Amendment is also without merit. Fundamentally the due process clause has served to absorb the basic rights of the Bill of Rights into the Fourteenth Amendment as a limitation upon the states. See cases collected in *McKay*, REAPPORTIONMENT AND EQUAL PROTECTION, 61 Mich. L. Rev. 645, p. 669, ftn. 101 (1963). Other than mentioning the due process clause

appellant does not, nor could he, develop any argument in support of the alleged violation.

The philosophy of Section 22 was aptly stated by Judge FULD when he wrote (13 N Y 2d at 143):

> "The repeated efforts of New York City extending over the last century, to provide some form of minority representation in the machinery of local government is evidence of the widespread feeling that such representation can play an important role in a democracy. Indeed, in the *Johnson* case, the court characterized it as 'an attempt to make representative government a reality' (274 N. Y., at p. 430). Be that as it may, New York's latest experiment in limited voting, approved by its inhabitants, is one which the Constitution permits it to make."

WHEREFORE appellees respectfully move that the within proposed appeal be dismissed, or in the alternative, that the order entered upon the remittitur of the Court of Appeals be affirmed.

December 10, 1963.

Respectfully submitted.

LEO A. LARKIN
Corporation Counsel
Attorney for Appellees

SEYMOUR B. QUEL,
JOEL L. COHEN,
Of Counsel.

APPENDIX A

"Minority Representation
Alternative Section 22

Application of Section

§1200. The following section shall take effect as section twenty-two of the charter proposed herewith and shall be a part thereof superseding section twenty-two as set forth therein if the system of limited voting for minority representation in the council herein provided for the election of borough-wide members of the council is approved by the electors of the city when the question is submitted to them.

Composition of Council

§22. a. The council shall consist of the president of the council and of other members termed councilmen.

b. One councilman shall be elected from each senate district as now or hereafter constituted lying wholly or partly within the city, and *two councilmen shall be elected at large from each of the boroughs.*

c. *No party or independent body as defined in the election law shall nominate more than one candidate for councilman to be elected at large in any borough.*

d. *Each elector shall have the right to vote for not more than one candidate at large and the two candidates receiving the largest number of votes in each borough shall be elected.*

e. The first election of councilmen at large shall be held at the general election in the year nineteen hundred sixty-three and the terms of councilmen so elected shall expire coterminously with those of the councilmen then in office." (Emphasis supplied.)

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